

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREENSPRINGS BAPTIST CHRISTIAN) Case No. 09-1054 SC
FELLOWSHIP TRUST,)
)
Plaintiff,) ORDER GRANTING
) MOTIONS TO STRIKE
v.)
)
ROBERT MILLER, an individual;)
BARBARA MILLER, an individual;)
ANNE MILLER, an individual; JAMES)
P. CILLEY, an individual; MARK A.)
SCHMUCK, an individual; and)
TEMMERMAN, CILLEY & KOHLMANN, LLP,)
)
Defendants.)
_____)

I. INTRODUCTION

This is a suit for malicious prosecution, brought by Plaintiff Greensprings Baptist Christian Fellowship Trust ("Greensprings") against Defendants Robert ("Bob") Miller, Barbara ("Barbara") Miller, and Anne Miller ("Anne," and collectively, "the Millers"), as well as attorneys James Cilley, Mark Schmuck, and their firm, Temmerman, Cilley & Kohlmann, LLP (collectively, "Attorney Defendants," and collectively with the Millers, "Defendants"). See First Am. Compl. ("FAC"), Docket No. 4. Now before the Court are Defendants' special motions to strike the FAC. Docket Nos. 28 ("Miller Motion"), 38 ("Attorney Motion"). Greensprings has filed an Opposition, Docket No. 46, and Defendants have each filed a

Reply, Docket Nos. 53 ("Attorney Reply"), 54 ("Miller Reply").
 Having considered the papers submitted by all parties, the Court
 GRANTS the Defendants' motions.

II. BACKGROUND

A. Turchen and Greensprings

This case is the most recent in a series of suits that can be traced back to Greensprings' connection with two deceased individuals, Elsie Turchen ("Turchen") and her son, Ward Anderson ("Ward"). This relationship is not the focus of the present suit; nevertheless, a short overview is helpful as background. Ward passed away on July 12, 1998, and Turchen passed away on December 10, 2000. Glazner Decl. Ex. 1 ¶ 24;¹ Miller Mot. at 3. Before Turchen passed away, she had deeded a number of properties to Greensprings. Bohn Decl. ¶ 3.² These properties were managed by Ber Management ("Ber"), which employed Christine Dillon ("Dillon") and Donald Bohn ("Bohn"), who both apparently worked closely with

¹ Pamela Glazner, counsel for the Millers in the current litigation, filed a declaration in support of the Miller Motion. Docket No. 33. The document that the Court here cites is the Second Amended Complaint in a related suit, Anderson v. Dillon, No. CIV 445617 (San Mateo Sup. Ct., filed Mar. 18, 2005). The Millers request that this document be subject to judicial notice, and both parties have submitted various court documents from other law suits involving parties to this suit, and have requested that this Court take judicial notice of these documents. Docket Nos. 32, 39, 50, 55. The Court may take judicial notice of proceedings and filings in other courts. See United States ex rel. Robinson Racheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992). The Court hereby GRANTS these requests for judicial notice.

² Donald Bohn, whose relationship to the litigation will be discussed in greater detail below, submitted a declaration in support of Greensprings' Opposition. Docket No. 47

1 the Turchen properties. Id. ¶¶ 3-4, 11. This Court has not been
2 presented with evidence that explains why Turchen transferred
3 properties to Greensprings, or what the nature of the personal
4 relationship between Turchen, Dillon and Bohn was. After Turchen
5 passed away, Dillon was evidently handling properties of the
6 estates, as well as property of Greensprings, although she
7 apparently lacked the proper authority to do so. Id. She
8 allegedly held herself out as the representative of Turchen's
9 estate. Miller Mot. at 3. The relationship between Greensprings
10 and the estates was the subject of a separate litigation brought by
11 Penny Anderson ("Penny"), who is the daughter of Ward and the
12 granddaughter of Turchen. See Anderson v. Dillon, No. CIV 445617
13 (San Mateo Sup. Ct., filed Mar. 18, 2005) (hereinafter "the
14 Anderson suit"). The Anderson suit reached a settlement, and its
15 outcome does not impact the current suit.

16 **B. Turchen's Gift to the Millers**

17 Barbara and Bob Miller are the adoptive parents of Molly
18 Miller ("Molly"), who is the biological daughter of Penny and
19 therefore the granddaughter of Ward and great-granddaughter of
20 Turchen. Barbara Aff. ¶ 1; Bob Aff. ¶ 1.³ Barbara and Bob are
21 also the biological parents of Anne Miller. Barbara Aff. ¶ 1; Bob
22 Aff. ¶ 1. On November 23, 2000, less than three weeks before
23 Turchen passed away, Turchen wrote a one-page letter to Bob and
24 Barbara. See Barbara Miller Aff., Ex. 1 ("Turchen Letter"). By
25 this letter, Turchen offered the gift of a house to Anne and Molly:

26
27 ³ Barbara and Bob both submitted an affidavit in support of
28 the Miller Motion. Docket Nos. 29, 30.

1 I would like to do something for your girls. I do
2 not shop; and I don't want to send things that
3 have to be exchanged, or are not useful so I have
4 failed to do anything on either Annie's or Molly's
5 birthdays.

6 Would you consider the gift of a house for them?
7 Enclosed is the picture. It is one in which Bob
8 would have its use which includes 3 bedrooms, 2
9 baths and one or even 2 offices. It is well
10 located and has been rented, so it requires some
11 maintenance, which I would gladly do. It is free
12 and clear.

13 It will go vacant approximately 2/1/2001.

14 As you know, I am very ill. However I come to the
15 office every day. When you call me at night, I am
16 usually asleep; and it is hard to talk to you.

17 I need to know before 2/1/2001 if you are
18 interested; and a call in the daytime would be
19 appreciated.

20 The house is one block off the El Camino on the
21 west side, and on a cul-de-sac. It is 325 Malcom,
22 Belmont, Ca.

23 I think we could slip this through as an
24 inter-family change of vesting, but I will do
25 anything you prefer.

26 Id.

27 The Millers did not accept this gift before Turchen passed
28 away. Barbara Aff. ¶ 4.

29 **C. The Alleged Promise Between Dillon and the Millers**

30 In an attempt to reach Turchen, Barbara contacted Bohn and
31 learned of Turchen's passing. Id. ¶ 5. Barbara claims that Bohn
32 referred her to Dillon, and that Dillon "said that she had been
33 looking after Elsie and that Elsie turned to Ms. Dillon whenever
34 she had a problem," and told Barbara that she was aware of the
35 Turchen Letter. Id. ¶¶ 5-6. According to Barbara, Dillon told her
36 that Turchen "did not own the property listed in the letter because
37 Ward had put it in a trust, but that she wanted to honor Elsie's
38 gift to Molly and Anne anyway." Id. ¶ 6. According to
39 Greensprings, Turchen had actually deeded the house to

1 Greensprings. Opp'n at 1. Barbara claims that Dillon offered to
2 have the house appraised, so that she could give the Millers the
3 equivalent amount of money, and that Dillon later informed Barbara
4 that the house had been appraised for approximately \$500,000.
5 Barbara Aff. ¶¶ 6-7.

6 Barbara states that she and Bob decided that the money should
7 go to a charity on behalf of Molly and Anne, and they chose the
8 Maui Preparatory Academy ("MPA") because it was planning to buy
9 land near the Millers' home. Id. ¶ 7. In 2002, Greensprings did
10 attempt to provide \$500,000 to MPA at the Millers' urging, although
11 the parties apparently disagree as to how this contribution was to
12 be characterized. See Bohn Decl. ¶¶ 6, 10, Exs. A, B. Bohn states
13 that the gift was to be in honor of Ward and Turchen, and that
14 "there was no request at that time for a gift in the names of Anne
15 and Molly Miller or for a gift in lieu of the house." Id. In
16 2002, Bohn traveled to Maui to look at the proposed development.
17 Id. ¶ 6. On August 11, 2002, two checks totaling \$500,000, signed
18 by Bohn, were issued from "Real Estate Trust" to "First Hawaiian
19 Title Company," and donated by a "Grace Parish Church."⁴ Opp'n at
20 2-3; Barbara Aff. ¶ 9. Shortly thereafter, the Millers wrote to
21 Bohn and Dillon, explaining that "First Hawaiian Title Company" did
22 not exist, and asking them to reissue the checks to "First Hawaii
23 Title Corporation" instead. Opp'n at 3; Barbara Aff. ¶ 10-11.
24 Bohn and Dillon did not reissue the check over the next two years,
25

26 ⁴ The Court has not received an explanation as to what Grace
27 Parish Church was, or whether it was an actual entity associated
28 with Greensprings or Ber.

1 and the Millers apparently ceased contact with them in or around
2 late 2002. See Bohn Decl. Ex. C ("November 14, 2004, Letter").

3 On November 14, 2004, the Millers sent a letter to Dillon and
4 Bohn, acknowledging that "it has been close to two years since our
5 last contact." Id. The letter described how MPA had overcome
6 certain difficulties in procuring land for the new school, and
7 explained that MPA was raising money to renovate a building on its
8 newly-acquired land. Id. As this letter is central to several of
9 Greensprings' arguments for the present motion, it is worth quoting
10 at length (note that Turchen is referred to by her nickname,
11 "Teddy"):

12 You left us in quite an embarrassing position
13 the last time by first issuing two checks one in
14 the amount of \$497,000.00 and the other in the
15 amount of \$3,000.00 neither one of them originating
16 from the Grace Parish Church. I can't begin to
17 tell you how happy the MPA school board was to
18 receive the donation. That was until they realized
19 you had issued the checks to a non-existent Title
20 Company rendering the checks valueless. The
21 embarrassment continued when we hired an attorney
22 to work with Grace Parish Church and Mr. John Wyse
23 as President of Grace Parish Church on the Land
24 Purchases Agreement you sent to MPA. Not only
25 could the attorney not find any listing of a Grace
26 Parish Church nor could he find it's [sic]
27 President, Mr. John Wyse. He informed MPA that
28 this was a non-existent entity, the details of
which were very suspicious to say the least. Such
behavior would tend to suggest that you have
something to hide and that more importantly you are
afraid of any inquiry that might result in
discovery.

As you are well aware, this entire effort on
our part is an attempt to provide a decent
education for our daughter and Elsie G. Turchin
[sic] and Ward D. Anderson's grandchild Molly
without the added hardship of a three hour a day
commute on a dangerous road. This is what Teddy
and Ward would have wanted for Molly and I have the
documentation to prove it. We can afford to pay
the tuition but not build the school ourselves. As

1 Molly's education is dependent on the success of
2 MPA as her only school alternative we will ask both
3 of you again for the last time to issue a check in
4 the amount of \$500,000.00 payable to Maui
5 Preparatory Academy c/o Molly Miller. (This time,
6 however, without the embarrassment that went along
7 with your previous attempts at trying to appear as
8 having done something but in reality did not.)
9 This money represents the fair market value
10 (according to the appraisal you told us you had
11 done) of the home at 325 Malcolm, Belmont, Ca. that
12 Teddy was about to give Molly and Annie on her
13 deathbed. This was also the verbal agreement that
14 you had come to with us regarding this matter and
15 that is why you issued the checks for \$497,000.00
16 and \$3,000.00 respectively to honor that agreement.
17 You both know that this is the right thing to do
18 but if you should decide not to you will be forcing
19 us to commence an investigation of your handling of
20 Grandma Teddy's estate if for no other reason than
21 to find out the reason for your peculiar behavior
22 and just what it is that you are trying to hide
23 with respect to Grandma Teddy's along with Grandpa
24 Ward's respective estates. This is the last thing
25 that we want to embark on but we believe that we
26 owe it to Grandma to see that her last wish
27 regarding this matter is fulfilled. We look
28 forward to hearing from you. . . .

16 Id.

17 On January 10, 2005, Bohn sent the Millers a cashiers check
18 for \$500,000, made out to MPA. Barbara Aff. ¶ 12; Opp'n at 3.
19 Barbara did not cash this check because, as she claims, she did not
20 approve of actions taken by MPA's new board president. Barbara
21 Aff. ¶ 12. Barbara apparently decided that she did not want MPA to
22 receive the funds, and on July 22, 2005, Barbara sent a letter to
23 Dillon and Bohn requesting that the cashier's check be reissued to
24 three other academic institutions. Id. ¶ 13; Barbara Aff. Ex. 5.
25 Bohn referred Barbara to attorney Carleton Briggs ("Briggs"), and
26 Barbara repeated her request to him. Barbara Aff. ¶ 13.

27 On August 11, 2005, Briggs sent Barbara a letter, informing
28

her of the Anderson suit, and stating that he had been ordered to "assume direct control of all the accounts and to suspend charitable donations or unapproved expenditures while the court examines [the] allegations" Barbara Aff. Ex. 8. He stated that the check would be deposited in the Greensprings account, and then reissued after a motion with the court in Anderson, which would be done "with all possible haste" Id. According to Briggs' letter, the money would remain in separate, interest-bearing accounts and earmarked for the schools that Barbara had indicated. Id. Barbara returned the check. Barbara Aff. ¶ 15. However, the money was never submitted to the schools, and was instead paid into Turchen's estate as part of the settlement in the Anderson suit. Opp'n at 4. The Millers thereafter filed a suit of their own against Greensprings. Miller v. Greensprings Baptist Christian Fellowship Trust, No. 07-4776 (N.D. Cal. removed Sept. 17, 2007) ("the Miller suit").⁵

D. The Miller Suit

In the Miller suit, the Millers alleged that Greensprings had breached a contract with the Millers, unlawfully converted the \$500,000 in question, and committed fraud. Notice of Removal, Ex. A at 5-8, Miller Docket No. 1. The Millers requested that the \$500,000 be paid to them personally (or rather, to Anne and Molly), and also requested punitive damages. Id. at 9. The Millers claimed that they had relied upon Dillon and Briggs' assurances, and that based on these assurances they had made no claim against

⁵ Court documents in the underlying action are referred to as Miller Docket No. XX.

1 Turchen's estate and had returned the certified check to
2 Greensprings. Id. at 5-6. Magistrate Judge Larson dismissed the
3 complaint with leave to amend. Miller Docket No. 48 ("First
4 Dismissal Order"). In short, the court explained that the Millers
5 had failed to make a showing of damages, because the \$500,000 in
6 question was to be donated to charities and thus the Millers had
7 suffered no loss. Id. at 4-5. The Millers had also failed to
8 explain how Turchen's gift of a house resulted in viable claims
9 against either Greensprings or Turchen's estate. Id. at 5.

10 The Millers amended their complaint, and added Bob as a
11 plaintiff. Miller Docket No. 49. This complaint added several
12 allegations, including a claim that the Millers had pledged
13 \$200,000 to Seabury Hall in reliance on assurances made by
14 Greensprings or its associates, and that Seabury Hall had begun to
15 pursue collection of the pledge. Id. ¶¶ 45, 57. The Millers
16 therefore also requested \$200,000 as alternative relief. Id. at
17 26. The Millers also added two novel theories to their complaint
18 -- intentional and negligent interference with the right to
19 inherit. Id. ¶¶ 91-102.

20 Magistrate Judge Larson dismissed this amended complaint.
21 Docket No. 98 ("Second Dismissal Order"). The \$200,000 pledge had
22 been promised not by the Millers themselves, but by the Miller
23 Family Foundation, a separate entity that was not part of the
24 action and which was in suspended status. Id. at 7. As a new
25 breach-of-contract theory, this claim had also become time-barred.
26 Id. As Magistrate Judge Larson noted, the "interference with the
27 right to inherit" claims are not recognized by existing law. Id.

1 at 8, 16-17. The Millers also failed to support any of their prior
2 claims. The facts surrounding the alleged contract did not support
3 a conclusion that the Millers' claimed reliance was reasonable, and
4 the Millers' could not point to a valid claim that they had waived
5 in reliance upon any of the alleged promises. Id. at 8-11.
6 Finally, the court noted that a payment of \$500,000 by Greensprings
7 would ultimately be an ultra vires act, and could result in the
8 loss of Greensprings' tax exempt status. Id. at 11-12.

9 Following the dismissal of the Miller suit, Greensprings
10 brought the present suit against the Millers and Attorney
11 Defendants (who served as the Millers' counsel in the Miller suit),
12 claiming that the Miller suit was an instance of malicious
13 prosecution. See FAC. The Defendants have responded by filing
14 special motions to strike under California's anti-SLAPP statute,
15 section 425.16 of the California Code of Civil Procedure ("section
16 425.16").⁶ See Attorney Mot.; Miller Mot. These motions are
17 premised on the notion that, by proceeding in the Miller suit, they
18 were essentially participating in a protected activity, i.e., the
19 right to petition. The Court now evaluates the validity of these
20 claims.

21 22 **III. LEGAL STANDARD**

23 To determine whether to grant an anti-SLAPP motion brought
24
25

26
27 ⁶ "SLAPP" stands for "strategic litigation against public
28 participation."

1 under section 425.16, a court must undertake a two-step process.⁷
2 First, the defendant must show that the cause of action arises from
3 "any act of that person in furtherance of the person's right of
4 petition or free speech under the United States or California
5 Constitution in connection with a public issue" Cal. Civ.
6 Proc. Code § 425.16(b)(1); Kearney v. Foley & Lardner, LLP, 566
7 F.3d 826, 836 (9th Cir. 2009). Defendants need only make a prima
8 facie showing that the activity that forms the basis for the
9 plaintiff's suit is protected. See Flatley v. Mauro, 39 Cal. 4th
10 299, 315-16 (2006). However, if the challenged activity is illegal
11 as a matter of law, "where either the defendant concedes the
12 illegality of its conduct or the illegality is conclusively shown
13 by the evidence," then the activity is not protected and the motion
14 must be denied. Id.

15 If the defendant establishes that they have met their burden,
16 then the burden shifts, and the court "must then determine whether
17 the plaintiff has demonstrated a probability of prevailing on the
18 merits." Kearney, 566 F.3d at 836 (citing DuPont Merck Pharm. Co.
19 v. Super. Ct., 78 Cal. App. 4th. 562, 567 (Ct. App. 2000)). The
20 plaintiff "must demonstrate that the complaint is both legally
21 sufficient and supported by a sufficient prima facie showing of
22 facts to sustain a favorable judgment if the evidence submitted by
23 the plaintiff is credited." Vargas v. City of Salinas, 46 Cal. 4th
24 1, 19-20 (2009) (quoting Wilson v. Parker, Covert & Chidester, 28

26 ⁷ This section may be invoked by defendants in federal court.
27 See Verizon Del., Inc. v. Covad Communs. Co., 377 F.3d 1081, 1091
28 (9th Cir. 2004).

1 Cal. 4th 811, 821 (2000)). "The plaintiff need only establish that
2 his or her claim has 'minimal merit' to avoid being stricken as a
3 SLAPP." Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260,
4 291 (2006) (citations omitted).

5 Evidence submitted by both parties may be considered, and
6 although "the court does not weigh the credibility or comparative
7 probative strength of competing evidence, it should grant the
8 motion if, as a matter of law, the defendant's evidence supporting
9 the motion defeats the plaintiff's attempt to establish evidentiary
10 support for the claim." Id. at 20 (citations omitted). Evidence
11 must be of the type admissible at trial, and averments made on
12 information and belief will not suffice. Salma v. Capon, 161 Cal.
13 App. 4th 1275, 1289 (Ct. App. 2008).

14
15 **IV. DISCUSSION**

16 **A. Whether Defendants Have Established that Greensprings'**
17 **Suit Arises From an Act in Furtherance of Defendants'**
Right to Petition

18 Defendants must first establish that the act that is the basis
19 for this malicious prosecution suit, i.e., the act of bringing the
20 Miller suit, was a protected act as defined by sections
21 425.16(b)(1) and (e). See Kearney, 566 F.3d at 836. Protected
22 acts are those that "aris[e] from any act of [the defendant] in
23 furtherance of the person's right of petition or free speech under
24 the United States or California Constitution in connection with a
25 public issue." Cal. Civ. Proc. Code § 425.16(b)(1). These acts
26 include:

27 (1) any written or oral statement or writing made
28

1 before a legislative, executive, or judicial
2 proceeding, or any other official proceeding
3 authorized by law; (2) any written or oral
4 statement or writing made in connection with an
issue under consideration or review by a
legislative, executive, or judicial body, or any
other official proceeding authorized by law

5 Id. 425.16(e).

6 Statements or allegations that are made in a judicial
7 proceeding, as well as "the basic act of filing litigation or
8 otherwise seeking administrative action," are generally covered by
9 the statute. Briggs v. Eden Council for Hope and Opportunity, 19
10 Cal. 4th 1106, 1115 (1999); see also Chavez v. Mendoza, 94 Cal.
11 App. 4th 1083, 1087 (Ct. App. 2001) ("It is well established that a
12 lawsuit is an exercise of a party's constitutional right of
13 petition. . . . Further, the filing of a judicial complaint
14 satisfies the "in connection with a public issue" component of
15 section 425.16, subdivision (b)(1) because it pertains to an
16 official proceeding." (citations omitted)). Some courts have
17 stated that a suit for malicious prosecution, which by its nature
18 challenges the act of initiating and participating in an official
19 proceeding, is covered by section 426.16 as a matter of law. See,
20 e.g., Barak v. Quisenberry Law Firm, 135 Cal. App. 4th 654, 661
21 (Ct. App. 2006).

22 Greensprings contends that the Miller suit was not a protected
23 act, because the lawsuit was illegal as a matter of law. See Opp'n
24 at 6-11. Greensprings asserts that the November 14, 2004, Letter
25 constitutes extortion as a matter of law, and that the Miller suit
26 was based on an extortionate act and therefore illegal. Id. For
27 support, Greensprings cites Flatley v. Mauro, which denied an anti-

1 SLAPP motion in a suit alleging civil extortion. 39 Cal. 4th 299.
2 In Flatley, the underlying act of extortion centered around a
3 woman's accusations that Flatley had raped her, and the subsequent
4 letters, phone calls, and cajoling exchanges between her lawyer,
5 Mauro, and Flatley's representatives. Id. at 305-11. Mauro set a
6 deadline for payment, continuously threatened to go to the media if
7 he was not paid, and also threatened to go to the media if
8 Flatley's representatives insisted on investigating the claim. Id.
9 The facts were undisputed, and the California Supreme Court
10 concluded that Mauro's behavior constituted extortion as a matter
11 of law. Id. at 328-332. Because Flatley's suit was based on
12 Mauro's extortionate and illegal behavior, it was not protected by
13 section 425.16, and Mauro's special motion to strike was denied.
14 Id. The court made it clear that its:

15 conclusion that Mauro's communications constituted
16 criminal extortion as a matter of law are based on
17 the specific and extreme circumstances of this
18 case. . . . Thus, our opinion should not be read
19 to imply that rude, aggressive, or even belligerent
20 prelitigation negotiations, whether verbal or
21 written, that may include threats to file a
22 lawsuit, report criminal behavior to authorities or
23 publicize allegations of wrongdoing, necessarily
24 constitute extortion.

21 Id. at 332 n.16.

22 Greensprings also likens this case to that of Cohen v. Brown,
23 173 Cal. App. 4th 302 (Ct. App. 2009), in which a court denied an
24 anti-SLAPP special motion to strike a complaint for civil
25 extortion. Opp'n at 9-10. In Cohen, the plaintiff and defendant
26 were attorneys who had worked together on a case. 173 Cal. App.
27 4th at 306-11. The attorneys had a dispute that involved fees, and

1 the defendant attorney had threatened to file a complaint with the
2 California State Bar if the plaintiff attorney did not agree to
3 endorse a settlement check for the case that they had worked on.
4 Id. at 310-11. The defendant attorney thereafter filed a false
5 complaint with the Bar. Id. at 311. The court noted that it is
6 irrelevant whether the party that performed the extortionate act
7 sought to collect money that was justly due. Id. at 318.

8 Extortion is defined as "the obtaining of property from
9 another, with his consent . . . induced by a wrongful use of force
10 or fear, or under color of official right." Cal. Penal Code § 518.
11 "Fear, such as will constitute extortion, may be induced by a
12 threat, either: . . . [t]o accuse the individual threatened . . .
13 of any crime; or . . . [t]o expose, or to impute to him or them any
14 deformity, disgrace or crime" Id. § 519.

15 Greensprings here asserts that the November 14, 2004, Letter
16 was extortionate, citing the following passage:

17 [I]f you should decide not to [issue the check to
18 MPA,] you will be forcing us to commence an
19 investigation of your handling of Grandma Teddy's
20 estate if for no other reason than to find out the
21 reason for your peculiar behavior and just what it
22 is that you are trying to hide with respect to
23 Grandma Teddy's along with Grandpa Ward's
24 respective estates.

22 Opp'n at 9 (quoting November 14, 2004, Letter). Bohn claims that
23 Dillon was "extremely frightened" by the threat, and for this
24 reason issued the second payment of \$500,000, this time to MPA.
25 Bohn Decl. ¶ 11. Greensprings also cites a statement made by the
26 Attorney Defendants during an oral proceeding in the Miller suit,
27 to the effect that Greensprings received the Millers' silence as

1 consideration for its promise to pay the \$500,000. Opp'n at 9
2 (quoting Rice Decl., Ex. I, at 7).

3 The Court disagrees with Greensprings, and finds that filing
4 the Miller suit was protected under section 425.16, for two
5 reasons. First, the alleged extortion in this case does not rise
6 to the level of the "specific and extreme circumstances" that were
7 present in Flatley or Cohen. Greensprings only cites a single
8 sentence from a single letter, and this line only threatens to
9 investigate to determine "what they are trying to hide" by issuing
10 faulty checks and delaying payment. Such a statement may be
11 supportive of an inference of extortion when coupled with other
12 statements, but standing alone it is not specific or extreme enough
13 to constitute extortion as a matter of law. Similarly, the
14 statements made by the Attorney Defendants, which purport to show
15 that Greensprings had bought the Millers' silence, only serve to
16 demonstrate the Millers' desperate attempt to grasp at straws in
17 order to show some semblance of consideration or reliance in the
18 Miller suit. Even together, these facts do not compel the
19 conclusion that the Millers committed extortion as a matter of law.
20 Accord Fleming v. Coverstone, No. 08-355, 2009 U.S. Dist. LEXIS
21 22021, at *11-12 (S.D. Cal. Mar. 18, 2009) (finding threat to
22 expose illegal tax scheme and unethical conduct unless deposit was
23 returned to fall short of "extreme circumstances" envisioned by
24 Flatley).

25 Even assuming that the November 14, 2004, Letter can be
26 construed as extortion, this would not establish that the activity
27 that Greensprings is challenging in its complaint is not an

1 activity protected by section 425.16. Greensprings is not bringing
2 a suit for civil extortion, but a suit for malicious prosecution.
3 The challenged activity is therefore not the November 14, 2004,
4 Letter, but the Miller suit that came several years after the
5 letter. Although Greensprings is alleging that Miller suit "was
6 based on" the November 14, 2004, Letter, this is not clearly so.
7 As described above, the Millers had alleged promises that Dillon
8 had made before the letter, and promises that Briggs made well
9 after the letter. There were numerous exchanges of checks that
10 came both before and after the letter. As a result, even if
11 Greensprings can succeed in painting the November 14, 2004, Letter
12 as extortionate, the Miller suit was clearly based on more than
13 simply the letter. As such, filing and maintaining the suit was a
14 protected act, even though Greensprings can identify a related,
15 non-protected act. See Gallanis-Politis v. Medina, 152 Cal. App.
16 4th 600, 613 (Ct. App. 2007) (collecting cases supportive of
17 conclusion that, "where a cause of action alleges both protected
18 and unprotected activity, the cause of action will be subject to
19 Code of Civil Procedure section 425.16 'unless the protected
20 conduct is 'merely incidental' to the unprotected conduct'"
21 (quotations omitted)).

22 Similarly, Greensprings argues that, by referring to the
23 \$200,000 pledge made in the name of the Miller Family Foundation,
24 the Millers illegally attempted to assert the rights of a suspended
25 corporation in violation of section 19719 of the California Revenue
26 and Taxation Code. Opp'n at 10. The Miller's raised this argument
27 in their amended complaint, and they raised it peripherally and in
28

1 the alternative. This appears to have been another unsuccessful
2 attempt by the Millers to establish reliance. The Court finds that
3 the Millers' argument does not remove the entire suit from the
4 protection of section 425.16. Defendants have met their burden
5 with respect to the first prong of the anti-SLAPP inquiry.

6 **B. Whether Greensprings Has Demonstrated a Probability of**
7 **Prevailing on the Merits**

8 The burden now shifts to Greensprings, to allege and
9 substantiate a valid claim for malicious prosecution. See Vargas,
10 46 Cal. 4th at 19-20. To prevail in its malicious prosecution
11 claim, Greensprings must show that the prior action: "(1) was
12 commenced by or at the direction of the defendant and was pursued
13 to a legal termination favorable to the plaintiff; (2) was brought
14 without probable cause; and (3) was initiated with malice."
15 Soukup, 39 Cal. 4th at 292. The first element is uncontested. See
16 Miller Mot. at 11. Greensprings must therefore make a minimal
17 showing, substantiated by evidence, that the prior suit lacked
18 probable cause and was initiated with malice. See Soukup at 291-
19 92.

20 **1. Whether the Miller Suit Lacked Probable Cause**

21 "The question of probable cause is 'whether, as an objective
22 matter, the prior action was legally tenable or not.'" Id.
23 (quoting Sheldon Appel Co. v. Albert & Olier, 47 Cal.3d 863, 868
24 (1989)). There are two ways of establishing that a suit was brought
25 without probable cause, based on either factual deficiencies or
26 legal deficiencies: "A litigant will lack probable cause for his
27 action either if he relies upon facts which he has no reasonable
28

1 cause to believe to be true, or if he seeks recovery upon a legal
2 theory which is untenable under the facts known to him." Sangster
3 v. Paetkau 68 Cal. App. 4th 151, 164-65 (Ct. App. 1998). Probable
4 cause must exist for every cause of action in the underlying
5 action; if just one of the theories asserted lacks probable cause,
6 then this part of the plaintiff's burden is met. See Soukup, 39
7 Cal. 4th at 292.

8 Greensprings offers three types of argument to suggest that
9 the Millers lacked probable cause to bring the Miller suit. First,
10 Greensprings claims that the suit lacked probable cause because the
11 facts asserted in the suit were false, and the Defendants knew of
12 their falsity. FAC ¶ 20. However, Greensprings never identifies
13 which claims were false. Greensprings does not deny that there was
14 a promise to make a \$500,000 donation. At most, the evidence
15 submitted by Greensprings insinuates that the Millers
16 mischaracterized the promise, and the alleged mischaracterizations
17 are relatively trivial.⁸ See Bohn Decl. ¶¶ 6, 10. This does not
18

19 ⁸ The Millers claim that the promise to make the donations was
20 1) in lieu of the gift of a house and 2) in the names of Molly and
21 Anne. See Barbara Aff. ¶¶ 6-7. Bohn contests both aspects in his
22 declaration. See Bohn Decl. ¶¶ 6, 10. Dillon did not submit any
23 declaration demonstrating her understanding of her own promise, and
24 without establishing a foundation as to how Bohn came to know of
25 the alleged promises first hand, his declaration does not
26 constitute admissible evidence that the Millers' claims were false
27 or known to the Millers to be false. No other evidence undermines
28 the Millers' claim that the promise to pay \$500,000 was in lieu of
the house, and no other explanation has been posed -- indeed, the
court finds it the only reasonable explanation posed by either
party for the first payment of \$500,000. Greensprings does provide
two 2002 e-mails from Barbara, in which she also described the
donation as in honor of Turchen, rather than Anne and Molly. See
Bohn Decl. Exs. A, B. Even assuming that Greensprings has proven
that this is a mischaracterization, it would add no strength to the
Millers' claims, would be irrelevant to the underlying litigation,

1 amount to a showing that the Millers brought the underlying suit
2 based on claims that they had no reason to believe to be true.
3 Greensprings must therefore establish that the Miller suit lacked
4 probable cause because of the deficiencies of its underlying legal
5 theories.

6 Greensprings also offers a kind of formal argument to
7 establish that the Miller suit lacked probable cause: that the
8 dismissal of the Miller suit was "a finding that the Millers and
9 their attorneys did not have probable cause to bring the prior
10 action . . . and has *res judicata* effect in later actions." Opp'n
11 at 13. This argument is patently false. A dismissal for failure
12 to state a claim is not a finding that the suit lacks probable
13 cause. A suit lacks probable cause only if no "reasonable attorney
14 would have thought the claim tenable." See Sheldon Appel, 47 Cal.
15 3d at 886; see also Roberts v. Sentry Life Ins., 76 Cal. App. 4th
16 375, 382 (1999) ("Probable cause may be present even where a suit
17 lacks merit."). Not every claim that gets dismissed is objectively
18 unreasonable. The fact that the Miller complaints were dismissed
19 may be necessary for the conclusion that the suit lacked probable
20 cause -- however it does not end the inquiry. Similarly, the Court
21 is not persuaded by the Millers' argument that, just because the
22 Millers were granted leave to amend their complaint after it was
23 first dismissed, the previous court must have ipso facto recognized
24 some merit in Millers' claims. See Miller Mot. at 14; see also
25 Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when
26 _____
27 and does not even paint Greensprings or its associates in a
28 negative light.

1 justice requires."). Such an inference would be especially
2 inappropriate where the previous court, in granting leave to amend,
3 listed a slew of factual deficiencies that needed to be developed
4 before a claim could be stated. See First Dismissal Order at 5.

5 Finally, Greensprings argues that "the deficiency lies in an
6 untenable legal theory or theories under the facts pleaded." Opp'n
7 at 12. Having reviewed the claims asserted by the Millers in the
8 Miller suit, the Court agrees with Greensprings that at least some
9 of these claims lacked probable cause because the legal theory
10 asserted was wholly inapplicable. The Millers brought their
11 breach-of-contract claim without a colorable showing of either
12 damages, consideration, or reliance. The Millers claimed
13 forbearance in asserting claims against the Turchen estate, but
14 this Court has searched the pleadings in both suits in vain for an
15 explanation of a theory or valid claim that the Millers or Molly
16 could have asserted against the estate, and agrees that the
17 Millers' "forbearance was worthless, since they had no viable claim
18 against [Turchen's] estate." Second Dismissal Order at 10-11, 18;
19 see also Miller Docket No. 84 ("Miller Opposition to MTD") at 9-10.
20 The Millers attempted to use the Miller Family Foundation's pledge
21 of \$200,000 to establish reliance by the Millers, and to state an
22 alternate claim for \$200,000, but this was not supported by the
23 facts. As the Second Dismissal Order noted, not only was the
24 Miller Family Foundation suspended, but the pledge could not have
25 reasonably served as a basis for liability against the Millers.
26 See Second Dismissal Order at 7-8. In addition to the breach-of-
27 contract claim, the Millers' claims for interference with the right

1 to inherit were both legally novel and unsupported by any
2 explanation as to how they acquired a colorable claim to inherit.
3 See Miller Opp'n to MTD at 19. Neither the Millers nor the
4 Attorney Defendants attempt to explain how any of these claims were
5 objectively reasonable in their Motions or Replies, or in papers
6 filed in the underlying suit. This Court finds that these claims
7 not only lacked merit; they objectively lacked probable cause.

8 2. Whether Greensprings Established Malice

9 Greensprings must next establish by proof that the Millers and
10 the Attorney Defendants were actually malicious in filing and
11 prosecuting the Miller suit. While probable cause is an objective
12 standard, malice "relates to the subjective intent or purpose with
13 which the defendant acted in initiating the prior action"
14 Sheldon Appel, 47 Cal. 3d at 874. Although malice is typically an
15 issue of fact to be determined by a jury, id., Greensprings must at
16 least make a minimal showing of malice to establish a probability
17 of success and survive the anti-SLAPP motion, see Soukup, 39 Cal.
18 4th at 291. The Court finds that Greensprings has failed to make
19 this showing.

20 "Malice cannot be established simply by a showing of the
21 absence of probable cause, although the fact that the prior suit
22 was objectively untenable is a factor that may be considered on the
23 issue of malice." Id. Additional evidence "must include proof of
24 either actual hostility or ill will on the part of the defendant or
25 a subjective intent to deliberately misuse the legal system for
26 personal gain or satisfaction at the expense of the wrongfully sued
27 defendant." Downey Venture v. LMI Ins. Co., 66 Cal. App. 4th 478,

1 498 (Ct. App. 1998); see also Estate of Tucker v. Interscope
 2 Records, 515 F.3d 1019, 1031 (9th Cir. 2008) (quoting Downey
 3 Venture). "Evidence of malice is typically drawn from inferences
 4 and circumstantial evidence." Paulus v. Bob Lynch Ford, Inc., 139
 5 Cal. App. 4th 659, 675 (Ct. App. 2006). California courts have
 6 identified a number of instances that demonstrate malice:

7 [T]he principal situations in which the civil
 8 proceedings are initiated for an improper purpose
 9 are those in which (1) the person initiating them
 10 does not believe that his claim may be held valid;
 11 (2) the proceedings are begun primarily because of
 12 hostility or ill will; (3) the proceedings are
 13 initiated solely for the purpose of depriving the
 14 person against whom they are initiated of a
 15 beneficial use of his property; (4) the proceedings
 16 are initiated for the purpose of forcing a
 17 settlement which has no relation to the merits of
 18 the claim.

14 Albertson v. Raboff, 46 Cal. 2d 375, 383 (1953); Paulus, 139 Cal.
 15 App. 4th at 675 n.12 (listing same instances demonstrating malice).

16 Greensprings' FAC and Opposition do not make a minimal showing
 17 of malice. The FAC includes a number of unsupported claims with
 18 respect to the intent of the Millers and their attorneys. FAC ¶¶
 19 22, 24. Such averments do not amount to "proof" sufficient to
 20 establish likelihood of success for the purpose of surviving a
 21 special motion to strike. See Salma, 161 Cal. App. 4th at 1289.
 22 The single piece of evidence that Greensprings cites is the
 23 November 14, 2004, Letter, which it claims demonstrates malice and
 24 "actual hostility." FAC ¶ 23; Opp'n at 22. While the letter is no
 25 paragon of courtesy, the Court does not find that it demonstrates
 26 more hostility than does typical pre-litigation posturing. Nor
 27 does this letter demonstrate that the Millers brought the suit for
 28

1 an improper purpose, or believed their claims invalid. Rather, the
2 letter strongly suggests that the Millers brought suit for the
3 purpose that they have always stated: to induce Greensprings to
4 follow through on its alleged promise to provide a \$500,000
5 donation.

6 As previously discussed, Greensprings argues that the Millers
7 made certain "false claims," FAC ¶¶ 22, 24, but in its Opposition,
8 Greensprings fails to identify any false claims and does not
9 substantiate this assertion. The best that Greensprings can
10 establish by admissible evidence is that the Millers
11 recharacterized the promised donation, by stating that it was "in
12 honor of Ikie [Ward] and Grandma Teddy" in 2002, Bohn Decl. Ex. B,
13 and then by later claiming that the donation was to be in the names
14 of Molly and Anne, see Barbara Aff. ¶ 7. The Court finds that
15 these claims are not wholly inconsistent, that they raise at most a
16 trivial issue, and that they are barely relevant to the litigation.
17 This is legally insufficient to establish a minimal showing of
18 malice. At best, this establishes that the parties had a different
19 understanding of a detail to their agreement, and Greensprings does
20 not assert that the agreement itself was fabricated. C.f.
21 Swat-Fame, Inc. v. Goldstein, 101 Cal. App. 4th 613, 634 (Ct. App.
22 2002) (overruled on other grounds by Zamos v. Stroud, 32 Cal. 4th
23 958 (2004)) (finding possibility of malice where complainant
24 admitted to making false statements in complaints).

25 Greensprings also argues that the overall weakness of the
26 arguments that the Millers made in the Miller suit demonstrates the
27 improper purpose of "forcing a settlement that has no relation to
28

1 the merits of the claims." Opp'n at 22-23. It cites a number of
2 the unfounded arguments raised by the Millers' attorneys, which the
3 Court addressed in Part IV.B.1, supra. Id. Although these
4 arguments were objectively poor and therefore made without probable
5 cause, there is no indication that they were made in bad faith, and
6 the fact that they lacked probable cause is itself legally
7 insufficient to establish malice. See Downey Venture, 66 Cal. App.
8 4th at 498 (" Merely because the prior action lacked legal
9 tenability, as measured objectively (i.e., by the standard of
10 whether any reasonable attorney would have thought the claim
11 tenable), without more, would not logically or reasonably permit
12 the inference that such lack of probable cause was accompanied by
13 the actor's subjective malicious state of mind." (citations
14 omitted)). Greensprings offers no evidence that the Millers
15 attempted to procure an unwarranted settlement (or any settlement),
16 thus it is not clear how the suit could be construed as an attempt
17 to force "a settlement that has no relation to the merits of the
18 claims." Rather, the Millers' efforts demonstrate an intent to
19 succeed or reach a settlement with respect to the promised donation
20 that was at the very heart of their suit, however futile their
21 arguments to this end might have ultimately been. C.f., HMS
22 Capital, Inc. v. Lawyers Title Co., 118 Cal. App. 4th 204, 218-19
23 (Ct. App. 2004) (citing questionable settlement tactics and lack of
24 progress in prosecution to establish malice).

25 Greensprings' final argument is that the Millers were
26 malicious because they attempted "to force Greensprings to do an
27 *ultra vires*." Opp'n at 23. The Court will not infer, without any

1 evidence, that the Millers foresaw the tax consequences that their
2 success may have upon Greensprings, nor that the Millers filed or
3 maintained this suit for the improper purpose of achieving this
4 result.

5 Greensprings has shown that the Millers were frustrated. It
6 has shown that there was some nitpicking over the peripheral terms
7 of an undisputed promise. It has convinced the Court that the
8 claims in the ensuing lawsuit were without an objectively
9 reasonable legal basis. However, without more, Greensprings cannot
10 make a minimal showing of malice.

11
12 **V. CONCLUSION**

13 Defendants' Motions to Strike are hereby GRANTED, and
14 Greensprings' FAC is DISMISSED. However, in light of the policy
15 favoring liberal amendment of claims embodied by Rule 15(a) of the
16 Federal Rules of Civil Procedure, Greensprings is granted leave to
17 amend its complaint if it believes that it can make a successful
18 showing of malice. If Greensprings chooses to amend its complaint,
19 it must do so within thirty (30) days of the date of this order.

20
21 IT IS SO ORDERED.

22
23 July 28, 2009

24 
25 UNITED STATES DISTRICT JUDGE